



June 27, 2002

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2002-3482

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164954.

The City of El Paso (the "city") received a request for nine categories of information pertaining to the El Paso police department. You inform this office that the city has no objection to the release of information responsive to categories two, four, five, six, and seven of the request. You also inform us that the city is unable to locate any information responsive to category eight and a portion of category four of the request. In this regard, we note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You claim that portions of the requested information responsive to categories one, three, and nine of the request are excepted from disclosure under section 552.101, 552.107, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code excepts from disclosure information deemed confidential by law, including information made confidential by other statutes. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (Emphasis added.) Thus, such information cannot be released to a member of the public in response to an open records request. See Open Records Decision No. 495 (1988). You state that the city has no objection to the release of the copy of an audio tape of an open session of the El Paso Civil Service Commission (the "commission"), but assert that the two other responsive audio tapes are of closed sessions of the commission. The city must therefore withhold from the requestor the two audiotapes you have submitted as Exhibits H and I under section 552.101 in conjunction with section 551.104(c) of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Prior decisions of this office have found that financial information relating to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 545 (1990), 373 (1983). A public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common-law right of privacy. Open Records Decision No. 545 (deferred compensation plan). Information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. Open Records Decision No. 600 at 10 (1992). For example, this office has held that an employee's participation in the Texas Municipal Retirement System or in a group insurance plan funded by the governmental body is not excepted from disclosure under common-law privacy. *Id.*; Open Records Decision No. 480 (1987). The employee's optional coverages will generally be funded by the employee and not the state. An employee's decision to enroll for optional coverages is a personal financial decision to allocate part of his compensation to optional benefits, and, therefore, the related information is excepted from disclosure by a right of privacy.

You inform us that Exhibit E consists of payroll audit reports for several different police officers. Upon review of the information in Exhibit E, we agree that the information you have highlighted, with the exception of the officers' social security numbers, is made confidential under common-law privacy and is therefore excepted from disclosure under section 552.101.

With regard to the officers' social security numbers contained in Exhibit E, we note that in Open Records Decision No. 670 (2001), this office concluded that, under section 552.117(2), a governmental body may withhold the home address, home telephone number, personal cellular phone number, personal pager number, social security number, and family member information of a "peace officer" as set forth in article 2.12 of the Texas Code of Criminal Procedure without requesting a decision from this office. Therefore, the city must withhold the social security numbers that you have highlighted in Exhibit E under section 552.117(2).²

You have also highlighted certain information in Exhibit D which you argue is excepted under section 552.117. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform us that the employee whose information you have highlighted in Exhibit D elected to withhold this information pursuant to section 552.024. Therefore, if this election was made prior to the date the city received the records request, the city must withhold the information you have highlighted in Exhibit D under section 552.117(1).

We next address your argument under section 552.107 to withhold a portion of the information contained in submitted Exhibit G. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Upon review of the information you seek to withhold in Exhibit G, we conclude this information is protected by the attorney-client privilege, and therefore, it may be withheld under section 552.107(1).

You also assert that section 552.108 of the Government Code excepts the cellular phone numbers and pager numbers of police officers. Section 552.108(b)(1) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained

²We also note your statement that, on the authority of ORD 670, the department will redact the social security numbers, home addresses and telephone numbers, and family member information of police officers from the information to be released.

for internal use in matters relating to law enforcement or prosecution” This section excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)).

In Open Records Decision No. 506, this office held that the predecessor to section 552.108(b) “protects the cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” Open Records Decision No. 506 at 2 (1988). You represent that the cellular phone numbers and pager numbers in question are those of law enforcement officers and are paid for by the city and used only for official business. Therefore, we agree that release of the cellular phone numbers and pager numbers would interfere with law enforcement and crime prevention. Accordingly, the city may withhold the cellular phone numbers and pager numbers you have highlighted in Exhibit C.

Finally, you argue that certain information in Exhibit B is excepted from disclosure under section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

On this basis, we agree that the city must withhold the Texas vehicle identification numbers and license plate numbers you have highlighted in Exhibit B under section 552.130.

To summarize, the city must withhold from the requestor the two audiotapes you have submitted as Exhibits H and I under section 552.101 in conjunction with section 551.104(c) of the Government Code. The information you have highlighted in Exhibit E must be withheld under section 552.101 and common-law privacy, with the exception of the officers’ social security numbers, which must be withheld under section 552.117(2). The city must withhold the information you have highlighted in Exhibit D under section 552.117(1) if the employee made an election under section 552.024 prior to the date the city received the records request. The information you have highlighted in Exhibit G may be withheld under section 552.107(1). The city may withhold the cellular phone numbers and pager numbers you have highlighted in Exhibit C under section 552.108. Finally, the city must withhold the Texas vehicle identification numbers and license plate numbers you have highlighted in Exhibit B under section 552.130. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325.

Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael A. Pearle".

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 164954

Enc. Submitted documents

c: Mr. Roy Brandys
Attorney at Law
701 St. Brain Street
El Paso, TX 79902
(w/o enclosures)